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In The
Supreme Court of the United States

VICTORIA JACKSON GRAY ADAMS, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal From The United States District Court, District Of Columbia

APPELLANTS' REPLY BRIEF

JOHN C. BONIFAZ
Counsel of Record
BONITA TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW,
10th Floor
Washington, DC 20004
(202) 942-8400

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The appellees argue that the *Adams* appellants' claims lack merit principally because, under BCRA's hard money increases, the *Adams* appellants are free to choose not to give or accept contributions up to $2,000 per individual or up to $12,000 per individual in races involving self-funded opponents.[1] That "freedom" argument is divorced from reality, misconstrues the appellants' claims, and ignores Supreme Court precedent prohibiting wealth discrimination in the electoral process. The illusory "freedom" posited by the appellees is no more relevant to the BCRA's hard money increases than to electoral barriers such as the poll tax and candidate filing fees that have been struck down by this Court. BCRA's hard money increases can hardly be deemed to bestow any meaningful freedoms on non-wealthy voters and candidates. Rather, they make access to personal wealth and affluent backers a pre-requisite for electoral participation, in violation of the constitutional guarantee of equal protection for all.

The *Adams* appellants, as potential candidates for federal office and as voters, have standing to challenge their exclusion from the electoral process as caused by BCRA's hard money increases. More than four decades of federal case law make clear that the *Adams* appellants have the right to challenge electoral barriers which exclude them

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[1] The appellees' claim recalls Anatole France's observation that the "law, in its majestic equality, forbids the rich, as well as the poor, to sleep under the bridges, to beg in the streets, and to steal bread." Anatole France, LE LYS ROUGE, (Calmann-Laevy, 1894). Non-wealthy voters obviously do not have the luxury of *deciding* whether to make large campaign contributions.

based on their economic status and that BCRA's hard money increases violate their equal protection rights.

I. THE *ADAMS* APPELLANTS HAVE STANDING TO CHALLENGE THE INCREASED HARD MONEY CONTRIBUTION LIMITS OF BCRA.

In order to have standing, a litigant must have suffered a concrete and particularized injury in fact, which is fairly traceable to the defendant's conduct and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The appellants in this case present such an injury. The record demonstrates that candidate appellant Cynthia Brown has standing because the BCRA hard money increases will, in every practical sense, make meaningful competition for federal office impossible for her and other candidates lacking access to wealth. The hard money increases will multiply the advantages enjoyed by candidates with access to networks of large donors,[2] and will thereby diminish or eradicate the prospects of candidates lacking such access.[3]

[2] *See Adams* Exh. 1, Declaration and Expert Report of Derek Cressman, (hereinafter "Cressman Decl."), J.S. App. 21a-29a; *Adams* Exh. 2, Declaration and Expert Report of Prof. John C. Green, ¶4 (hereinafter "Green Decl."), J.S. App. 30a-44a; *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald, (hereinafter "McDonald Decl."), J.S. App. 45a-54a.

[3] *See Adams* Exh. 22, Declaration of Cynthia Brown (hereinafter "Brown Decl."), J.S. App. 93a-95a. As documented by expert witness Derek Cressman, fundraising nearly always determines success. Candidates with a substantial financial advantage won 94 percent of the time in the 2000 elections, Cressman Decl. ¶ 2, J.S. App. 22a, and maximum contributions made up 60 percent of individual donations to those winners. *Id.* ¶ 5, J.S. App. 23a. Candidates lacking access to large

(Continued on following page)

The voter appellants have standing because the BCRA hard money increases will exclude them from the electoral process based on their economic status and will deny voter-supporters, such as appellant Carrie Bolton,[4] an equal opportunity to elect the candidates of their choice. *See Adams* appellants' opening brief at 2-13.

A. Candidate Appellant Cynthia Brown, Among The *Adams* Appellants, Has Competitor Standing.

In denying that appellants have suffered cognizable harm, the appellees ignore case law explicitly recognizing competitive electoral injury as a justiciable claim. "[I]t is well-settled that an economic actor may challenge the government's bestowal of an economic benefit on a competitor. . . . Courts within this Circuit and elsewhere have expanded the competitor standing doctrine to the political

networks of maximum donors have testified that, under BCRA's hard money increases, they will be deterred from seeking federal office. *See also Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo, J.S. App. 79a-82a; *Adams* Exh. 20, Declaration of Gail Crook, J.S. App. 83a-87a; *Adams* Exh. 21, Declaration of Victor Morales, J.S. App. 88a-92a; *Adams* Exh. 23, Declaration of Ted Glick (hereinafter "Glick Decl."), J.S. App. 96a-99a.

[4] *See Adams* Exh. 25, Declaration of Carrie Bolton (hereinafter "Bolton Decl."), J.S. App. 103a-106a; *Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams, J.S. App. 100a-102a; *Adams* Exh. 26, Declaration of Daryl Irland, J.S. App. 107a-109a; *Adams* Exh. 27, Declaration of Anuradha Joshi, J.S. App. 110a-112a; *Adams* Exh. 28, Declaration of Howard Lipoff, J.S. App. 113a-115a; *Adams* Exh. 29, Declaration of Nancy Russell, J.S. App. 116a-118a; *Adams* Exh. 31, Declaration of Kate Seely-Kirk, J.S. App. 127a-129a; *Adams* Exh. 32, Declaration of Stephanie L. Wilson, J.S. App. 130a-132a; *Adams* Exh. 30, Declaration of Chris Saffert, J.S. App. 119a-126a.

arena, recognizing that political actors may bring suit when they are competitively disadvantaged by government action." *Buchanan v. FEC*, 112 F.Supp.2d 58, 63 (D.D.C. 2000) (internal citations omitted). To deny cognizable injury from a candidate's loss of competitive advantage "would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election." *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989) ("*Fulani* I"); *cf. Fulani v. Brady*, 953 F.2d 1324, 1327 (D.C. Cir. 1991) ("*Fulani* II").[5] *See also Becker v. FEC*, 230 F.3d 381, 386 (1st Cir. 2000) (candidate had standing to challenge FEC regulations disadvantaging his campaign); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 37 (1st Cir. 1993) (candidate had standing to challenge campaign finance law that placed her campaign at a competitive disadvantage). The Court in *Becker* warned against second-guessing "a candidate's reasonable assessment of his own campaign," which "would require the clairvoyance of campaign consultants or political pundits – guises that members of the apolitical branch should be especially hesitant to assume." *Becker*, 230 F.3d at 387. Thus, an injury to a candidate's competitive advantage – such as that suffered by candidate appellant Cynthia Brown – provides the concrete, direct, and personal stake necessary to confer standing. The three-judge

[5] The Court in *Fulani* II noted that "[u]nquestionably, there is such a concept as 'competitor standing,'" 953 F.2d at 1327, but denied standing because plaintiff sued under the Internal Revenue Code and plaintiff's injuries were not fairly traceable to the tax status of the debate sponsor. The *Buchanan* decision notes that in *Fulani* II "the fact that the plaintiffs did not sue under FECA, but rather under the Internal Revenue Code, proved dispositive . . . . The FECA, unlike the Internal Revenue Code, confers a broad grant of standing." *See Buchanan*, 112 F.Supp.2d at 63.

district court below acknowledged as much in its Order of May 3, 2002, which granted the Motion to Intervene of the Defendant-Intervenors. *See* Order of May 3, 2002, at 7, (*citing Buchanan*, 112 F.Supp.2d at 65; *Vote Choice,* 4 F.3d at 37), Appendix to Madison Center Plaintiffs-Appellants' Reply Brief, 6a-7a.

B. The Voter Appellants And Candidate Appellant Cynthia Brown Have Standing Based On Their Exclusion From The Electoral Process.

The appellants' injury – exclusion from the electoral process based on economic status – is precisely the injury that voters and candidates claimed in the cases successfully challenging mandatory candidate filing fees. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). The Supreme Court held that candidates "lacking both personal wealth and affluent backers" were "in every practical sense" excluded from the electoral process by filing fees. *Bullock*, 405 U.S. at 143-144. This Court has declared that the rights of candidates are "intertwined with the rights of voters." *Lubin*, 415 U.S. at 716; *see also Anderson, et al. v. Celebrezze*, 460 U.S. 780, 786-787 (1983).

The standing of voters to challenge exclusionary electoral barriers is further affirmed by *Baker v. Carr*, 369 U.S. 186 (1962), and successor cases granting standing to voters who suffer a debasement of their vote due to legislative apportionment. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1963); *Gray v. Sanders*, 372 U.S. 368 (1963). Like the plaintiffs in those cases, appellants here are free to vote and to seek office, but their "influence on the political process as a whole" is

impaired. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). This is so because the *Adams* appellants cannot participate in any meaningful way under hard money ceilings that are so far out of their reach. Under BCRA's hard money increases, the voters among the *Adams* appellants simply can no longer make contributions at a level that ensures them an equal opportunity to elect the candidates of their choice. Even if candidate appellant Cynthia Brown were to collect contributions from thousands more supporters than her well-financed opponents, she could not hope to collect enough campaign dollars to approach the size of the war chests, under BCRA's hard money increases, of candidates with access to large networks of wealthy donors. "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *see also Int'l Assn. of Machinists v. FEC*, 678 F.2d 1092, 1098 (D.C. Cir. 1982) (finding standing for voters who alleged "a relative diminution in their political voices – their influence in federal elections" due to a financial disadvantage conferred on their preferred candidates by the Federal Election Campaign Act).

With regard to the *Adams* appellants' challenge to BCRA §§ 304 and 319 (collectively referred to as the "millionaire provisions"), the appellees ignore the concrete and particularized injury in fact suffered by appellant Cynthia Brown and her voter-supporter, appellant Carrie Bolton. Appellant Brown has testified that she was a candidate for the United States Senate from North Carolina in the 2002 Democratic Primary, Brown Decl. ¶ 3, J.S. App. 94a; that one of her opponents was a millionaire who "contributed enormous sums of money to his own campaign," *id.* ¶ 5, J.S. App. 94a; that another opponent

"raised large sums of money from wealthy contributors," *id.*; that her own contributions averaged approximately $25, *id.* ¶ 4, J.S. App. 94a; and that she would consider running again for the U.S. Senate, but the BCRA millionaire provisions would "seriously discourage" her from participating. *Id.* ¶ 7, J.S. App. 94a-95a.

> If I were to run for the U.S. Senate again from North Carolina, I would likely face again a millionaire opponent. Under the increases in the hard money contribution limits, my other opponents would be free to raise up to $12,000 per individual per election. The people I know can hardly afford to contribute twenty-five dollars, let alone $12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage for the U.S. Senate.

Id. ¶ 8-9, J.S. App. 95a.[6]

Appellant Brown and the other appellants filed this lawsuit during the 2002 election cycle. If Ms. Brown were to run for Senate in North Carolina in 2004, she likely would be in a race where the millionaire amendment provisions apply. Incumbent Senator John Edwards spent $6.15 million of his own money to win election in 1998, *see* Center for Responsive Politics, "John R. Edwards: Politician Profile," *available at* http://www.opensecrets.org/1998os/

[6] Appellant Bolton, a North Carolina voter supporting Ms. Brown, also testified regarding her desire to support Ms. Brown in future elections. Bolton Decl., J.S. App. 103a-106a.

index/N00002283.htm, and he will face re-election in 2004. Further, North Carolina press accounts have already noted that the millionaire provisions will likely be triggered even if Edwards does not run, since, in that event, Charlotte investment banker Erskine Bowles – who spent $6.8 million in his 2002 Senate bid – reportedly plans to enter the race. *See* Jim Morrill, *Law May Level Political Funding Field*, Charlotte Observer, June 24, 2003, *available at* http:/www.charlotte.com/mld/observer/news/6156128.htm. Another entrant in the primary, U.S. Rep. Richard Burr, has reportedly begun fundraising and would take advantage of the higher contribution limits if the millionaire amendment were triggered. *See id.*

The exclusion of appellant Brown and the voter appellants from the electoral process constitutes a concrete and particularized injury in fact.

C. The Appellants' Injury Is "Fairly Traceable" To The Challenged Provisions.

The appellants' injury is "fairly traceable" to the BCRA hard money increases. By enacting the increases, Congress enabled candidates with access to vast networks of wealthy donors to dominate the electoral process, denying candidates lacking access to wealth – such as candidate appellant Cynthia Brown – any meaningful opportunity to run for federal office. Further, by enacting the increases, Congress prevented voters lacking access to wealth – such as the voter appellants – from having an equal opportunity to elect the candidates of their choice.

Congress may not raise contribution limits to a level that effectively excludes voters and candidates based on their economic status and that debases and dilutes the fundamental right to vote. With the BCRA hard money increases, Congress has created two distinct classes of voters: those who, as a result of the increases, can employ vast networks of wealthy donors in support of the candidates of their choice and those who cannot. The Constitution prohibits the State from unlawfully weighting a citizen's vote in this way. *See Reynolds*, 377 U.S. at 565 (The Constitution requires "that each citizen have an equally effective voice. . . . ") *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., joined by Ginsburg, J., concurring) (*citing Reynolds*, 377 U.S. at 565).

D. A Favorable Decision Will Redress The Appellants' Injury.

Finally, the appellants' injury will be redressed by a favorable decision. An invalidation of the BCRA increases would return the hard money limits to the levels established by the Federal Election Campaign Act ("FECA") before BCRA's enactment. *See Conlon v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935) ("[A] void act cannot operate to repeal a valid existing statute. . . ."). As discussed in Section I:A of the appellants' opening brief, a constitutional violation may arise when existing disparities reach a level that causes injury of constitutional magnitude. Disparities of influence certainly existed under the previous FECA limits. The BCRA increases, however, impose insurmountable obstacles to the voter and candidate appellants' effective exercise of their basic rights to participate in the political process.

II. BCRA'S HARD MONEY LIMIT INCREASES VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION FOR ALL.

As demonstrated by the *Adams* appellants' opening brief, BCRA's hard money increases violate the equal protection rights of non-wealthy voters and candidates, such as the *Adams* appellants. The appellees' responsive brief fails to address longstanding Supreme Court precedent prohibiting wealth discrimination in the electoral process. In its landmark ruling, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966), the Court struck down the poll tax on equal protection grounds, finding that "[v]oter qualifications have no relation to wealth." In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court struck down mandatory candidate filing fees, stating: "We would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144; *see also Lubin v. Panish*, 415 U.S. 709 (1974); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) ("The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.").

The appellees attempt to sweep aside this precedent with the Orwellian assertion that the appellants "have the same opportunity as any other donors and candidates to make and receive contributions in the increased amounts." Brief for the Federal Election Commission, et al. at 128.[7] Under that reasoning, the *Harper* plaintiffs had the same

[7] *See also* Brief for the Federal Election Commission, et al. at 126 (appellants "themselves can now make and receive contributions up to the new $2,000 limit . . . ").

opportunity to pay the $1.50 poll tax in Virginia's state elections, and the *Bullock* plaintiffs had the same opportunity to pay the candidate filing fees in Texas' primary elections. The Court in *Bullock*, in fact, rejected this precise argument, finding that the candidates were "unable, not simply unwilling, to pay the assessed fees. . . . " *Bullock*, 405 U.S. at 146.

There is no substantive difference between the economic barriers to the political process imposed by the State in *Harper* and *Bullock* and the economic barrier imposed by BCRA's hard money increases. In *Bullock*, this Court acknowledged that "[t]he problem presented by candidate filing fees is not the same" as that presented by the poll tax in *Harper*. *Id.* at 142.

> Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Id. at 143 (internal citations omitted). In reviewing the Texas system, this Court concluded:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote.

Id. at 143-144. Thus, although the problems were not the same, the candidate filing fees in *Bullock* represented a distinction without a difference from the poll tax in *Harper*.

As with the candidate filing fees in *Bullock*, under BCRA's hard money increases, appellants and other potential office seekers who "lack[ ] both personal wealth and affluent backers are in every practical sense precluded" from running for federal office. This Court "would ignore reality were [it] not to recognize that [the BCRA hard money increases] fall[ ] with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 144; *see also Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 462 (2001) (evaluating the impact of campaign finance law in the context of "actual political conditions").

Appellant Cynthia Brown has run for the U.S. Senate from North Carolina in a race involving a self-funded candidate and other opponents supported by affluent backers, and she is considering running again for the U.S. Senate in 2004, facing similar circumstances. Under BCRA's hard money increases, candidates like appellant Brown will find it impossible to compete, because they are "unable, not simply unwilling," *Bullock*, 405 U.S. at 146, to gather contributions of up to $2,000 from wealthy donors or, under BCRA's millionaire provisions, up to $12,000 from such donors. *See* Brown Decl., ¶¶ 8-9, J.S. App. 95a; *see also* Glick Decl., ¶6, J.S. App. 98a ("It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute $12,000.").

Similarly, it is ludicrous to argue that voter-supporters of candidates such as appellant Brown have the same opportunity as other donors to make contributions in the increased amounts. As appellant Bolton testified: Under BCRA's millionaire provisions, "I would not even get on the scale with those making significant contributions." Bolton Decl., ¶11, J.S. App. 105a.

> Cynthia Brown is like most of us. She is not connected to people who have that kind of money. I could put up all the signs I wanted in that kind of future race, but I would never be able to get my voice heard. It would be like fighting a fire with a cup of water.
>
> The increases in the hard money contribution limits make it no longer conceivable that I can access the political process. They undermine the meaning and value of my vote.

Id., ¶¶11-12, J.S. App. 105a-106a.

As demonstrated by the *Adams* appellants' opening brief, BCRA's hard money increases will deprive non-wealthy voters of the ability to support meaningfully the candidates of their choice and will violate the right to vote as concretely as previous wealth barriers. The hard money increases will make access to "personal wealth and affluent backers" a prerequisite for electoral participation as surely as any filing fee and will allow such affluent backers to achieve a stranglehold on the electoral process. Even Defendant-Intervenor Senator Russ Feingold, the co-sponsor of BCRA, concedes that BCRA's hard money increases will likely further enable certain candidates to build up campaign war chests, "potentially discourag[ing] some people from running" for federal office. Deposition of Senator Russ Feingold, September 9, 2002, 264, line 14 to

265, line 3 (hereinafter "Feingold Deposition"), Jt. App. at 858. Defendant-Intervenor Feingold has also admitted that the hard money increases will benefit incumbent candidates facing candidates without access to wealth. Feingold Deposition, 260, lines 7-8, Jt. App. at 857.[8] Thus, BCRA's hard money increases will serve to entrench incumbents in power, thereby creating an "entrenched political regime[ ]," *Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring), which locks out voters and candidates, like appellants, who lack access to wealth.

A statute that increases campaign contribution limits should be assessed for its impact on the equal protection rights of voters and candidates lacking access to wealth. Just as this Court may find that a contribution limit is justified to prevent corruption and the appearance of corruption – as this Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court may also find that an increased contribution limit discriminates against voters and candidates according to their economic status.

The appellees turn a statement in the Court's ruling in *Buckley* on its head in an attempt to find justification for the hard money increases. Brief for the Federal Election Commission, et al. at 127. The *Buckley* Court stated that "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," *Buckley*, 424 U.S. at 30, in the context of its holding that the

[8] The factual record in this case demonstrates that the primary beneficiaries of the increases will be the very incumbents who enacted them. *See Adams* appellants' opening brief at 10-11; Cressman Decl., ¶19, J.S. App. 29a; *Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann, ¶¶5-12, J.S. App. 57a-60a.

individual $1,000 contribution limit was justified to prevent corruption and the appearance of corruption. The reliance on that statement here – involving contribution limit *increases* that do not address corruption but rather serve to entrench those in power – is entirely misplaced. In fact, BCRA's hard money increases will have precisely the effect the Court in *Nixon v. Shrink* held would be constitutionally impermissible. *See Nixon v. Shrink*, 528 U.S. at 397 (contribution limits are permissible unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beneath the level of notice, and render contributions pointless."). Thus, while the Constitution may prohibit some contribution limits because they are too low, it may also prohibit some limits because they are too high. Under BCRA's hard money increases, vast infusions of cash will drown out the voices of non-wealthy candidates, making the association of their supporters ineffective and rendering small contributions pointless.

BCRA's hard money increases debase and dilute appellants' right to vote, "a fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As such, these increases offend core equal protection principles that serve as the foundation of our constitutional democracy. This Court has a duty to uphold those principles and to prevent the imposition of this new economic barrier in the political process.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court; declare that sections 304, 307, and 319 of BCRA, codified in 2 U.S.C. § 431 *et seq.*, violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution; and remand the case to the district court with instructions to enter a permanent injunction restraining the appellees from enforcing or otherwise applying sections 304, 307, and 319 of BCRA and ordering the appellees to enforce the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, that were amended by sections 304, 307, and 319 of BCRA as such provisions existed prior to the enactment of BCRA. In the alternative, the Court should reverse the district court's ruling of nonjusticiability and remand the case for consideration on the merits.

Respectfully submitted,

DAVID A. WILSON
HALE AND DORR LLP
1455 Pennsylvania Avenue, NW, 10th Floor
Washington, DC 20004
(202) 942-8400

JOHN C. BONIFAZ
Counsel of Record
BONITA TENNERIELLO
LISA J. DANETZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
27 School Street
Suite 500
Boston, MA 02108
(617) 624-3900

Attorneys for Appellants

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